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In the Supreme Court of the United States

October Term, 1951

No. [redacted] 32

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PERRY,

Respondent.

BRIEF OF RESPONDENT

Opposing Petition for Writ of Certiorari

JAMES E. GILLESPIE,

Solicitor for Respondent.

W. L. [illegible]

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[illegible]

In the Supreme Court of the United States

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BRIEF OF RESPONDENT
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Opposing Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

The sole question in this case is whether or not the amount in controversy is in excess of Three Thousand Dollars ($3000) and accordingly sufficient to permit the Federal District Court to assume jurisdiction.

We shall discuss therefore only those parts of the petitioners' statements which are pertinent to the question of jurisdiction.

Respondent's bill of complaint was filed in the District Court on the equity side, asking for an injunction, accounting and receivership in respect of a trust fund of approximately Three Hundred Thousand Dollars ($300,000). The action was brought by complainant on behalf of herself and all other holders of so-called Widows' Pension Certificates of the Brotherhood of Locomotive Firemen and Enginemen.

The complaint alleged that upon death of her husband complainant-respondent became entitled to a pension of Thirty-five Dollars ($35) a month "during her lifetime, and

as long as she should not remarry''; that this claim was payable out of a fund known as the Widows' Pension Fund of the Widows' Pension Department kept by the Brotherhood separately and apart from its other funds and amounting to approximately Three Hundred Thousand Dollars ($300,000); that complainant was forty (40) years of age and that her rights based upon her expectancy had a net value in excess of Five Thousand Dollars ($5,000); that in August, 1931, the Brotherhood ordered the Department to discontinue all payments to pensioners, stopped all further dues and assessments, and authorized settlement with each pensioner for a sum of Fifteen Hundred Dollars ($1500) in cash; that the trustees of the Fund (the petitioners here) had thereby violated the terms of the trust as set up in the constitution of the Brotherhood (see page 80 of the Record); that the Fund was being diverted to purposes other than those permitted by the constitution and in violation of complainant's contractual rights and was being dissipated.

The prayer (Record, page 7) was as follows:

> ''Complainant prays that a trust in and of the said Widows' Pension Fund of the said Brotherhood of Locomotive Firemen and Enginemen be declared; that the defendants David B. Robertson, Timothy Shea and Albert Phillips be adjudged and declared to be Trustees thereof for Complainant and other widows and widowed mothers of deceased members who are beneficiaries of the said Widows' Pension Department; that said defendants David B. Robertson, Timothy Shea and Albert Phillips be required to account for and with respect to the funds of said Widows' Pension Fund in their custody and control and be enjoined and restrained from making further disbursements from the said fund except under appropriate order of this court; that a receiver be appointed to take charge of, administer and liquidate said fund for the benefit of your Complainant and other beneficiaries in like position and the creditors of the said fund; that the court fix the

priorities of the various claimants in and to the said fund, and Complainant prays for such other and further relief as shall seem meet and proper and as the nature of the case may require."

A motion to dismiss on the grounds of misjoinder and failure to state a cause of action (Record, page 14) was filed and overruled.

The answer (Record, page 18) admits that the fund in question amounting to Two Hundred Seventy Thousand Dollars ($270,000) was held by the Brotherhood separately and apart from its other funds, admits the action of the Brotherhood in abolishing the Department virtually as alleged in the bill of complaint, and alleges that a new benevolent fund had been set up from which the pensioners are to be paid. It makes practically the same allegation as the bill of complaint regarding the attempt to settle for Fifteen Hundred Dollars ($1500) cash with each pensioner, and says (Record, page 22):

"* * * that monthly payments of $35.00 per month have been made or tendered up to date to all pensioners who have not accepted settlement, including complainant Ella E. Pinkston; * * *."

Then follow allegations which are of peculiar interest in view of petitioners' present claim that less than Three Thousand Dollars ($3000) is the subject of the controversy in this case. The answer (Record, page 22) proceeds:

"Defendants further say that the present value of the securities and cash on hand in the Widows' Pension Fund is approximately $270,000.00; that to consummate settlements with the 22 pensioners who have agreed to accept $1500 each will cost $33,000.00; that the consummation of said settlements will leave a balance in the fund of approximately $237,000.00 with 51 pensioners on the Pension Roll; that if the settlements are not consummated there is an average amount on hand to meet each claim of approximately $3700.00;

that if the 22 settlements are consummated there will be an average amount in the fund to meet each claim of about $4650.00 and that the consummation of the 22 settlements already negotiated will enhance the value of the fund on hand about $100,000.00 and enhance the average amount on hand for the remaining claims about $950.00 each.

"Defendants further say that both the present value of each claim and the amount on hand to meet the claim of each pensioner on the Pension Roll is greatly in excess of $1500; * * *"

The answer then alleges facts intended to show that there had been no dissipation or diversion of the fund and no improper actions by the officials.

The controversy thus made up by the pleadings was whether or not defendants had administered properly the trust fund of Two Hundred Seventy Thousand Dollars ($270,000) and whether complainant-respondent was entitled to an accounting of the fund and to have the fund administered under orders of the Court by a receiver appointed by the Court. It is not denied by the answer or otherwise disputed in the record that complainant-respondent was entitled to all the Thirty-five Dollar ($35) monthly payments then accrued.

Notwithstanding that the petitioners had failed in their answer or otherwise to raise any jurisdictional question, the District Court, of its own initiation, after hearing the case on its merits, ruled that the amount in controversy was less than Three Thousand Dollars ($3000), and thereupon dismissed the case for want of jurisdiction, without passing on the merits and notwithstanding that the evidence was conclusive that the present value of respondent's claim was in excess of Five Thousand Dollars ($5000).

Petitioners' statement (page 4 of their petition) that

"the court found as a fact that the matter in controversy does not exceed the sum of $3,000.00"

is misleading unless it is understood that the District Court's decision was one of law; that is, that on the admitted facts the amount in controversy was not based on complainant's expectancy or on the amount of the trust fund sought to be administered by the Court, but on the unpaid payments of Thirty-five Dollars ($35) per month as accrued at the time of the commencement of the suit. *The right to those payments, however, was not denied and was not the subject of the real controversy, as above pointed out.*

This ruling was reversed by the Court of Appeals. Its opinion appears on page 131 of the record, and is set forth in full in the appendix to this brief.

ARGUMENT.

The question before this Court may be stated as follows:

A complainant having a pension certificate providing payments of Thirty-five Dollars ($35) per month, of which there was then unpaid less than Three Thousand Dollars ($3000), but having a life expectancy of twenty-six (26) years, whereby the present value of her claim is in excess of Five Thousand Dollars ($5000), sues in equity for an injunction, accounting and receivership in respect of a trust fund in which her own individual interest is Four Thousand Six Hundred Fifty Dollars ($4650) and which aggregated Two Hundred Seventy Thousand Dollars ($270,000). The right to the Thirty-five Dollar ($35) monthly payment is not in controversy. Is the amount in controversy in excess of Three Thousand Dollars ($3000)?

Whether or not the lower courts properly ignored the fact that the real controversy was as to an accounting and receivership of a trust fund of Two Hundred Seventy Thousand Dollars ($270,000) in which complainant-respondent's

individual interest was Four Thousand Six Hundred Fifty Dollars ($4650), we believe that the Court of Appeals was right in holding that the case was controlled by *Thompson vs. Thompson,* 226 U. S. 551. That case has never been reversed by this Court and stands as its authoritative pronouncement on the question sought to be raised herein.

The question there came up under an act establishing a Court of Appeals for the District of Columbia, which permitted a review of any final judgment or decree of that court

> "in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of $5,000.00."

A wife brought a suit for maintenance against her husband in the said court of the District of Columbia, which awarded her a decree requiring her husband to pay her $75 per month. The question raised in the Supreme Court was whether or not the amount in controversy exceeded the sum of $5,000, even though the payments due were less than $5,000.

On this point the opinion by Justice Pitney says (page 559):

> "Under the decree of the Supreme Court the payments of $75 per month for the support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance."

The opinion then proceeds (bottom page 559) as follows:

> "The statutory maintenance is thus assimilated to alimony, *in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband.*

See *Lynde v. Lynde,* 181 U. S. 183; *Audubon v. Shufeldt,* 181 U. S. 575, 578; *Lynde v. Lynde,* 64 N. J. Eq. 736, 751.

"Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. *The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated.*

"The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed five thousand dollars, *does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record.* In *Smith v. Whitney,* 116 U. S. 167, 173, the matter in dispute was stated to be 'whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars.' This court sustained the appellate jurisdiction. That case has been repeatedly cited upon the present point, *Smith v. Adams,* 130 U. S. 167, 175; *South Carolina v. Seymour,* 153 U. S. 353, 358; *Simon v. House,* 46 Fed. Rep. 317, 318, *Chesapeake & Delaware Canal Co. v. Gring,* 159 Fed. Rep. 662, 664; and its authority upholds our jurisdiction in the case before us." (Italics ours.)

Petitioners seek to distinguish the *Thompson* case on the ground that the future payments under consideration there were "fixed" by the Court's decree. They were, however, no more "fixed" than the Thirty-five Dollars ($35) a month claimed by respondent in the principal case. In the *Thompson* case, as stated by Mr. Justice Pitney, the amount payable under the decree was subject to be modified or cut off entirely in the event of a change in the cir-

cumstances of the parties (referring apparently to remarriage) or in the event of the death of the husband. In the principal case the annuity was subject also to be cut off in the case of remarriage or death. We can see no possible distinction in principle between the question passed upon by this Court in the *Thompson* case and that now before it in the instant case. We cannot conceive how the decision of the Court of Appeals herein can be reversed without overruling the *Thompson* case.

The case of *Elgin vs. Marshall*, 106 U. S. 578, relied on by petitioners, came up under a statute which limited the jurisdiction of this Court to review final judgments and decrees to those cases in which the matter in dispute, exclusive of costs, exceeded the sum of Five Thousand Dollars ($5,000). The plaintiff having recovered a judgment of $1,660.75 upon certain bonds and coupons, claimed that the matter in dispute exceeded $5,000 because the decision constituted an estoppel *as to other actions* which might be brought on bonds and coupons of the same issue, as they fell due.

It needs no argument that such a case is altogether unlike the principal case, or the *Thompson* case.

The case of *Wright vs. Mutual Life Insurance Co. of New York*, 19 Fed. (2) 117, briefly affirmed by this Court in 276 U. S. 602, also relied on by petitioners, was one in which the plaintiff sued at law to recover certain installments due on an insurance policy. Judgment was awarded for $1136.54. It was held by the Court of Appeals that the jurisdictional amount was not involved, even though the judgment would be an estoppel as *against future actions* for further installments.

In both of these cases, the actions were at law seeking a recovery for less than the jurisdictional amount. In the principal case, however, the complainant-respondent, hav-

ing a claim of the present value of Five Thousand Dollars ($5,000), sought to engage the strong arm of equity to take over the administration of a Fund in which her individual interest was Four Thousand Six Hundred Fifty Dollars ($4650), and which amounted in all to many times the jurisdictional amount.

The 5th Circuit Court of Appeals, which decided the case of *Wright vs. Mutual Life Insurance Co. of New York, supra,* afterwards decided the case of *New York Life Insurance Co. vs. Swift,* 38 Fed. (2) 175. The latter case was a suit in equity to cancel certain insurance policies exceeding $3,000 in face value. The District Court dismissed the action apparently on the ground that the amount involved was to be measured by the loan, cash surrender, or paid-up value of the policies, which in fact, at the time when the suit was brought, amounted to nothing at all. In reversing the District Court's decision, the Court of Appeals distinguished the *Wright* case, on the ground that the latter was a law case in which the amount sought to be recovered was less than the jurisdictional amount, whereas the case then before it was an equity case in which the subject matter consisted of the insurance policies. The Court of Appeals said (p. 176):

> "In a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount; in other words, the value of the right to be protected. If that exceeds $3,000, the District Court has jurisdiction *regardless of the amount of damage that has presently accrued. Scott v. Donald,* 165 U. S. 107, 17 S. Ct. 262, 41 L. Ed. 648; *McNeill v. Southern Railway Co.,* 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142; *Hunt v. New York Cotton Exchange,* 205 U. S. 322, 27 S. Ct. 529, 51 L. Ed. 821; *Bitterman v. L. & N. R. R. Co.,* 207 U. S. 205, 28 S. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Berryman v. Board of Trustees of Whitman College,* 222 U. S. 334, 32 S. Ct.

147, 56 L. Ed. 225. It is true none of these cases deals with life insurance policies, but the principle announced is applicable to all contracts." (Italics ours.)

If the District Court, instead of dismissing the principal case, had decided the case on the merits in favor of the complainant-respondent, it would have issued a decree requiring the appointment of a receiver of a large fund in which the complainant-respondent's individual interest was Four Thousand Six Hundred Fifty Dollars ($4650) or would have enjoined disbursements therefrom except under court order, and would have ordered an accounting of the Fund as respects the alleged wrongful transactions of the defendants-petitioners. The decree also would no doubt have provided that the complainant-respondent should be paid all installments then or thereafter due, but that would have been only incidental to the main provisions of the decree. That did not constitute the relief which was sought by the bill of complaint. Her right to that payment was not denied by the answer and was not the real subject of controversy. The issues raised by the pleadings constituted the real subject of controversy, which was whether or not there had been a misappropriation of trust funds in excess of the jurisdictional amount, and whether the complainant-respondent was entitled to have an accounting and receiver of those funds and an injunction against their use except as approved by the Court. In other words, the real controversy was whether or not the Brotherhood could put an end to the Fund, divert it to other uses than the pensions which it was designed to provide for and compel present settlements of pension claims at far below their present values. What the complainant-respondent was seeking was protection of her right to future payments. That right was worth in excess of Five Thousand Dollars ($5000). The Fund which she asked the court to administer amounted at least to Two Hundred

Seventy Thousand Dollars ($270,000). Her individual share in that Fund amounted to Four Thousand Six Hundred Fifty Dollars ($4650). How then can it be established that the controversy involved less than Three Thousand Dollars ($3000)?

Law cases in which no such equitable relief is prayed for and in which a judgment is asked for an amount considerably less than the jurisdictional amount can have little bearing upon the controversy under consideration here.

An equity case such as this is on all fours with the well-known case of *Berryman vs. Board of Trustees of Whitman College,* 222 U. S. 334. The action there considered arose upon a bill in equity to enjoin the levying of taxes upon the College. The amount of the tax then claimed by the taxing authorities to be due was less than the jurisdictional amount of $2,000. It was held (first paragraph of the syllabus) that

> "The amount in controversy where the question is whether a contract of exemption from taxation has been impaired by subsequent legislation is measured by the value of the right to be protected and not by a mere isolated element, such as the tax for a single year."

The opinion by Chief Justice White is in part as follows (p. 345):

> "The taxing officers of the county of Walla Walla, the defendants below and appellants here, insist that we may not review the merits, because the court below had no jurisdiction over the cause, and therefore we must reverse and remand, with directions to dismiss the bill. This rests upon the proposition that as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the power of taxation which might be exerted

in other taxing districts, or by adding taxes which, if the right to tax existed, might be assessed and levied in future years. This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.

"Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation and as broad as its power to acquire and hold property.

"Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount * * *."

In numerous other cases this Court has announced the same principle, for example, in *McNeill vs. Southern Ry. Co.*, 202 U. S. 543, and *Scott vs. Donald*, 165 U. S. 107.

For all of these reasons we believe that the decision of the Court of Appeals was right, and that there have been presented no sufficient reasons within the rules of this Court for a review here of that decision.

Respectfully submitted,

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APPENDIX.

OPINION OF COURT OF APPEALS.

(Filed March 8, 1934.)

Before MOORMAN, HICKS and HICKENLOOPER, Circuit Judges.

MOORMAN, Circuit Judge: Appellant, a resident of the State of Georgia, is the holder of a widow's pension certificate issued by the Brotherhood of Locomotive Firemen and Enginemen which entitles her, provided she does not remarry, to receive $35 a month during her lifetime from the funds of the Widow's Pension Department of the Brotherhood. In its convention held in June and July of 1931, the Brotherhood voted to discontinue the Widow's Pension Department, and directed its officers to make lump-sum settlements with all matured certificate holders at a sum not in excess of $1500 each, and further, to erase from the pension rolls the names of all those refusing to accept such settlements, and thereafter to distribute the residue of the funds then on hand among members of the department holding unmatured certificates. Notice of this action on the part of the Brotherhood was given to the appellant. The payment due September 1, 1931, under her certificate was not made, and she thereupon filed this bill against the Brotherhood and its executive officers, all residents of the State of Ohio, asking for an injunction restraining the disbursement of the funds of the department except as authorized by the constitution of the Brotherhood and the matured pension certificates, and that a receiver be appointed. The court granted a temporary injunction but refused to appoint a receiver. On final hearing the temporary injunction was dissolved and the bill was dismissed for want of jurisdiction on the ground that the matter in controversy did not exceed the sum or value of $3000.

In our opinion, the matter in controversy is not the accumulated pension fund nor the combined claims of all holders of matured certificates (*Lion Bonding Co. v. Karatz,* 262 U. S. 77, 85), but is the rights which appellant seeks to have protected, that is, her rights under the certificate which she holds. *Wisconsin Electric Co. v. Dumore Co.*, 35 Fed. (2d) 555, 556 (6 C. C. A.). This certificate binds the appellee to make monthly payments to appellant so long as she lives, provided she does not remarry, and in determining the value of her right to these payments it is permissible to take into consideration the probable duration of her life. The evidence shows that the normal expectancy of her life is 27.61 years, and that the present worth of her pension rights for that period is over $5000. The trial court held that the contract stipulation that the payments were to cease upon the appellant's remarriage as well as upon her death made the present value of these rights speculative and therefore prevented any computation thereof from being taken into account in determining the amount in controversy.

We think *Thompson v. Thompson,* 226 U. S. 551, is controlling. In that case the Supreme Court of the District of Columbia in a separate maintenance suit directed the husband to pay $500 for counsel fees and $75 a month for maintenance of a wife and child. The Court of Appeals of the District reversed the decree and the wife appealed to the Supreme Court of the United States, where the husband contended that the court lacked jurisdiction because it could hear only causes in which the matter in dispute, exclusive of costs, exceeded the sum of five thousand dollars. At the time the case was decided the accrued payments did not amount to the necessary $5000, but the court held that, considering the expectancy of the lives of the parties, the prospective payments were sufficient to make up the deficiency. In denying that the claim of these

payments was contingent the court said: The decree "clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

Appellees contend that the *Thompson* case is distinguishable from the case at bar in that in that case the payments could only be stopped by an order of court, whereas here they are to terminate automatically upon appellant's remarriage. It is generally held that remarriage is a sufficient ground to modify an alimony or maintenance award, and that being true, there is no distinction between future payments decreed in such a case and those claimed under contract such as the case at bar, for the wife's volition to remarry is the basis in either case of the change in obligation. We think the reasoning of the *Thompson* case is applicable to the present situation, and that the present worth of the future pension payments is not to be deemed so contingent or speculative as to prevent its being taken into account in determining the value of the matter in controversy, although such payments may be entirely cut off by the appellant's remarriage.

The failure of the appellant to file a narrative form of testimony in the District Court within the time allowed by Rule 38 of that court does not prevent our consideration of the testimony. *Alliance Securities Co. v. Killits*, 67 Fed. (2d) 480 (6 C. C. A.). Nor has the controversy here become moot. It is true that it was stated for appellant on the oral argument that she had no objection to settlements being made with other certificate holders, but she never waived her right to object to the threatened discontinuance of the payments to her according to the cer-

tificate which she holds, and appellees' promise to continue them cannot be accepted as nullifying the action taken by the Brotherhood in convention.

The decree below is reversed and the cause remanded for further proceedings.*

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* Judge Hickenlooper participated in the conference decision, but this opinion was not prepared until after his death.